IN THE IOWA SUPREME COURT

NO. 15-2143

WILMA KELLOGG,

Plaintiff-Appellant,

vs.

CITY OF ALBIA, IOWA

Defendant-Appellee.

APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR MONROE COUNTY
HONORABLE RANDY S. DEGEEST, JUDGE

PLAINTIFF-APPELLENT'S FINAL BRIEF AND REQUEST FOR ORAL ARGUMENT

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Iowa Code § 670.5

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ROUTING STATEMENT

This case should be retained by the Iowa Supreme Court because the issues raised involve substantial questions of enunciating or changing legal principles. Iowa R. App. P. 6.903(2) (d) and 6.1101 (2)(f).

STATEMENT OF THE CASE

Nature of the Case: Appellant Wilma Kellogg appeals a ruling granting Appellee City of Albia's Motion for Summary Judgment. The district court granted summary judgment in regard to Appellant's nuisance action based upon the "state of the art" defense under Iowa Code §670.4(h). In addition, the district court found the Appellant's claims to be barred by the statute of limitations. The Honorable Randy S. DeGeest presided at all relevant proceedings.

Course of Proceeding and Disposition Below: On February 25, 2015 Plaintiff/Appellant Wilma Kellogg filed a Petition and Jury Demand alleging that actions of the Defendant/Appellee City of Albia constituted a private nuisance which caused Ms. Kellogg damages. (App. 9) Further, Ms. Kellogg alleged negligence on the part of the City. (App. 9) Ms. Kellogg also requested injunctive relief in her petition. (Petition at Law; App. 9)

On March 25, 2015 the City of Albia filed its Answer and listed as affirmative defenses the applicable statute of limitations and immunity under Iowa Code §670. (App. 12-13).

On September 9, 2015 a Motion for Summary Judgment was filed on behalf of the City of Albia alleging that the City was entitled to immunity pursuant to Iowa Code §670 and that the Plaintiff's claim was barred by the statute of limitations. (App. 14) On October 16, 2015 the Plaintiff filed her Resistance to the City of Albia's Motion for Summary Judgment. (App. 63-65).

A hearing was held on the City of Albia's Motion for Summary Judgment on November 20, 2015 and the Court filed an Order on December 3, 2015 granting the motion. (App. 73-77). A Notice of Appeal was timely filed by the Plaintiff Wilma Kellogg. (App. 78).

STATEMENT OF THE FACTS

Plaintiff/Appellant Wilma Kellogg is the owner of certain property and a house located at 321 4th Avenue E, in Albia, Iowa. (App. 16). The house was originally built in 1983. (App. 16). Plaintiff lives at the property at 321 4th Ave E. with Edward Dean Glenn. (App. 16).

Ms. Kellogg's property has a storm sewer along the western edge of the property. (App. 16). The storm sewer was constructed by the City of Albia in a 1972 paving project. (App. 16).

Ms. Kellogg purchased her home in 2008. (App. 17). The house flooded in the spring of 2009. (App. 18). In 2010, Ms. Kellogg's house flooded again and she and Mr. Glenn asked the City of Albia if there was anything that they could do to fix

the storm sewer so that it would stop the flooding. (App. 18). In 2012, Ms. Kellogg's house flooded and again she spoke to the City and asked them if there was anything they could do to fix the storm sewer so that it would stop the flooding. (App. 18).

Ms. Kellogg recalls that the first water in the basement of the home occurred in 2009. (App. 80, pg. 26). She estimates that the basement has flooded eight or nine times since 2009. (App. 80, pg.26). Her testimony is that the flooding usually corresponds to a heavy rain. (App. 80, pg. 29). She recalls that the last time her home flooded was July 7, 2015. (App. 80, pg. 29). The photographic evidence in this case demonstrates that the storm sewer system creates a ponding effect during heavy rains. (App. 82-83, pgs. 37-38; App. 86-98).

Wilma Kellogg and Ed Glenn complained to the City of Albia about their ponding and flooding problems in 2012, 2013, and 2014 before bringing a lawsuit. (App. 85, pg.15). Each time the City informed them that it would look into the problem and see if there was anything that could be done to alleviate the problem. (App. 81-82 pgs. 33-34). The City never followed up on these discussions. (App. 82, pg. 36). She recalls that the last time her home flooded was July 7, 2015. (App. 80, pg. 29).

ARGUMENT

I. THE DISTRICT COURT ERRED IN GRANTING THE CITY OF ALBIA'S MOTION FOR SUMMARY JUDGMENT ON THE BASIS

THAT THE CITY WAS ENTITLED TO IMMUNITY FROM PLAINTIFF/APPELLANT WILMA KELLOGG'S NUISANCE CLAIM UNDER IOWA CODE §670.

Preservation of Error

Wilma Kellogg preserved error by resisting the City of Albia's Motion for Summary Judgment. (App. 63-65).

Standard of Review

This Court reviews a District Court's ruling on Summary Judgment for errors at law. *Miller v. Speirs*, 810 N.W.2d 870, 870 (Iowa 2011); Iowa R. App. P. 6.907. The District Court granted the City of Albia's Motion for Summary Judgment and Wilma Kellogg now appeals. (App. 73-77).

A summary judgment may only be rendered when the pleadings, affidavits, depositions, answers to interrogatories, and admissions on file "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Iowa R. Civ. P. 1.981(3).

A "material" fact is one which might affect the outcome, given the applicable governing law, and a "genuine" issue of material fact means that a reasonable jury could not return a verdict for the nonmoving party. *Hall v. Barrett*, 412 N.W.2d 648, 650 (Iowa App. 1987) citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). The burden is on the party moving for summary judgment to prove the facts are undisputed. *Estate of Harris v. Papa John's Pizza*, 679 N.W.2d 673, 677 (Iowa

2004) citing *Phillips v. Covenant Clinic*, 625 N.W.2d 714, 717-18 (Iowa 2001). A fact issue is generated, precluding summary judgment, if reasonable minds can differ on how the issue should be resolved. *Schluter v. Grinnell Mut. Reinsurance Co.*, 553 N.W.2d 614 (Iowa App. 1996). Summary judgment is functionally akin to a directed verdict; every legitimate inference that reasonably can be deduced from the evidence should be afforded to the nonmoving party, and a fact question is generated if reasonable minds can differ on how the issue should be resolved. *Knapp v. Simmons*, 345 N.W.2d 118 (Iowa 1984).

The record is to be reviewed in the light most favorable to the opposing party, who is afforded every legitimate inference that the record will bear. *Frontier Leasing Corp., v. Links Eng'g, L.L.C.*, 781 N.W.2d 772, 775 (Iowa 2010).

Argument

Defendant City of Albia's contends that the City is immunized by Iowa Code §670 from the Plaintiff Wilma Kellogg's private nuisance action.

The City of Albia treats Ms. Kellogg's case as a simple a negligence action based on the construction of the storm sewer system in 1972. The question on this appeal is whether Ms. Kellogg's cause of action for nuisance is subject to the same rules as a negligence action. Ms. Kellogg submits that the statutory immunity fails to reach a private nuisance action.

Iowa Code §670.2 subjects municipalities in Iowa to liability for their torts. Iowa Code §670.2. Municipal liability, however, is not without limit. Iowa Code §670.4. Iowa Code §670.4(h) bars any "claim based upon or arising out of a claim of negligent design or specification, negligent adoption of design or specification, or negligent construction or reconstruction of a public improvement as defined in section 384.37, subsection 19, or other public facility that was constructed or reconstructed in accordance with a generally recognized engineering or safety standard, criteria, or design theory in existence at the time of the construction or reconstruction." Iowa Code §670.4(h).

Under Iowa law, governmental immunities do not reach nuisance actions. The Iowa Supreme Court has explained why immunity does not reach this far:

> The rule of immunity of a governmental agency from liability for negligence in the exercise of governmental functions does not exempt it from liability for a nuisance created and maintained by it. The maintenance of a nuisance is not a governmental function.
>
> *Sparks v. City of Pella*, 258 Iowa 187, 189-190 137 N.W.2d 909, 911 (Iowa 1965).

The Court explained its reasoning for this rule:

> Nuisance is a condition, and not an act or failure to act on the part of the party responsible for the condition. A nuisance may be created as a result of negligence but proof of negligence is not required in all actions for nuisance.

Sparks v. City of Pella, 258 Iowa 187, 189-190 137 N.W.2d 909, 911 (Iowa 1965).

Simply stated, a nuisance action is not based on elements of negligence. The condition on the property is the important question for the fact finder, not the conduct of the Defendant.

Further, a Defendant must prove that the Plaintiff's cause of action is for negligence in order for Iowa Code §670.4(h) to apply. The statutory immunity applies to "claims" based on "negligent design or specification", "negligent adoption of design or specification", and "negligent construction or reconstruction." Iowa Code §670.4(h). Additionally, the limitation applies to claims for failure to upgrade, improve, or alter any aspect of a public improvement. Iowa Code §670.4(h).

In this case Wilma Kellogg's cause of action is not based on negligent actions or a negligent failure to upgrade. Instead Ms. Kellogg's actions are based on the creation of a condition and "not an act or failure to act on the part of the party responsible for the condition." *Sparks v. City of Pella*, 258 Iowa 187, 189-190 137 N.W.2d 909, 911 (Iowa 1965). The Iowa Supreme Court has opined:

> Negligence was not essential to appellant's liability in this case. Nor could the city absolve itself from liability for damage caused by a private nuisance of this character by proof that the plant was constructed under general legislative authority and in accordance with an approved plan prepared by competent engineers and duly adopted.
>
> *Ryan v. City of Emmetsburg*, 232 Iowa 600, 606, 4 N.W.2d 435, 440 (Iowa 1942).

A perfectly designed drainage system may cause a burden or condition on a person's property. In that situation the governmental entity must pay for the damage caused to the ownership interest in the property. Thus, the governmental immunity for state-of-the art defense does not apply to the damages in a nuisance case such as the one before this Court.

Therefore, the district court erred in granting summary judgment to the City of Albia on the immunity question under Iowa Code §670 as it does not apply to Wilma Kellogg's nuisance claim.

II. THE DISTRICT COURT ERRED IN GRANTING THE CITY OF ALBIA'S MOTION FOR SUMMARY JUDGMENT BASED ON THE APPLICABLE STATUTE OF LIMITATIONS UNDER IOWA CODE §670.5.

Preservation of Error

Wilma Kellogg preserved error by resisting the City of Albia's Motion for Summary Judgment. (App. 63-65).

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genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Iowa R. Civ. P. 1.981(3).

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The record is to be reviewed in the light most favorable to the opposing party, who is afforded every legitimate inference that the record will bear. *Frontier Leasing Corp., v. Links Eng'g, L.L.C.*, 781 N.W.2d 772, 775 (Iowa 2010).

Argument

A person pursuing a claim against a municipality under Iowa Code §670 has two years in which to pursue that claim. Iowa Code §670.5. The district court concluded that Ms. Kellogg's claim was barred by the applicable statute of limitations in this case.

The district court in granting the City's summary judgment motion determined that Ms. Kellogg cannot bring a claim for intermittent nuisance against a municipality. Ms. Kellogg submits that *K & W Elec., Inc. v. State* does not stand for the proposition that as a matter of law a Plaintiff cannot bring an intermittent nuisance action against a municipality. *K & W Elec., Inc. v. State*, 712 N.W.2d 107 (Iowa 2006). This proposition is an incorrect interpretation of *K & W Elec., Inc.* In *K & W* the Court was presented with a cause of action for inverse condemnation. *Id.* at 117. The Court reasoned that "inverse condemnation is analogous to a nuisance causing permanent injury because the injury for which compensation is sought in an inverse condemnation case—loss of the plaintiff's interest in the property—is also permanent in nature." *K & W* at 118.

It was necessary for the Iowa Supreme Court to reach that conclusion because it previously acknowledged that "Whether an injured party is entitled to bring successive actions for damages or must seek compensation for all injuries in one suit depend on the nature of the injury, and to some degree, the nature of the nuisance." *Id.* at 118. (citing *Eppling v. Seuntjens*, 254 Iowa 396, 404, 117 N.W.2d 820, 825

(1962)). The Court continued, "Where injuries from the nuisance are intermittent rather than continual, a property owner may bring successive actions to recover damages for each intermittent injury." *Id.* (citing *Eppling v. Seuntjens*, 254 Iowa 396, 404, 117 N.W.2d 820, 825 (1962)).

Thus, the question of when a cause of action accrues against a municipality is not a matter of law, but a question of fact concerning the nature of the injury and the nature of the nuisance. Ms. Kellogg advanced a theory of intermittent injury at the district court level. She recalls that the last time her home flooded was July 7, 2015. (App. 80, pg. 29). Thus, summary judgment was improvidently granted in this case.

Ms. Kellogg in the present case is seeking damages for an intermittent nuisance. (App. 8-9) Ms. Kellogg is further requesting an abatement of the nuisance. (App. 8-9) Plaintiff is also requesting the incidental damages associated with an abatement action. (App. 8-9) The law makes it clear that a jury is to determine whether a nuisance is permanent or temporary. *Hartzler v. Town of Kalona*, 218 N.W.2d 608 (Iowa 1974). In *Hartzler* the Iowa Supreme Court explained:

> Defendant insists the case must turn upon the distinction between permanent and temporary nuisances, citing *Ryan v. City of Emmetsburg*, 232 Iowa 600, 4 N.W.2d 435. Notwithstanding our holding in *Ryan v. City of Emmetsburg*, we believe the question of whether a nuisance is permanent or temporary is one of many questions which should ordinarily be determined by the trier of fact. We now approve the following:

> 'It is * * * for the jury to determine, as a question of fact, whether the defendant's acts were the proximate cause of the plaintiff's injury, whether the extent or degree of injury or annoyance is such as to constitute a nuisance, whether the plaintiff suffered the loss of the ordinary use and enjoyment of his home, so as to entitle him to damages, whether a nuisance is permanent or temporary, and where exemplary damages are sought, whether the defendant acted with malice or in reckless disregard of the rights of others.' 58 Am.Jur.2d, Nuisances, s 141, page 713.

Hartzler at 609.

As a result, the City of Albia must prove there is no genuine issue of material fact concerning whether the flooding on this property constitutes a permanent or temporary nuisance. Iowa R. Civ. P. 1.981(3). (explaining that for a moving party to be entitled to summary judgment the moving party must prove there are no genuine issues of material fact.) In *Ryan* the Iowa Supreme Court held:

> The mere fact that the sewers in a city are permanent in their construction does not render the nuisance occasioned by them permanent also, for the reason that the person creating it has the legal right and is under legal obligation to remove, change, or repair it, and thereby terminate the injury resulting therefrom. An abatable nuisance is not ordinarily considered a permanent nuisance.
>
> ...
>
> The mere fact that the city sewers were of permanent construction did not render the nuisance occasioned by them permanent also, for the municipality had the right at any time to abate it. * * * In this case, as is shown by the evidence, the remedy is in the defendant's own hands, by work done upon its own land.' * * * 'Here the remedy could be applied on defendant's own premises, and there can be no doubt of its duty to abate the nuisance.'

Ryan v. City of Emmetsburg, 232 Iowa 600, 608-9, 4 N.W.2d 435, 441 (Iowa 1942).

The City of Albia has brought forth no facts concerning whether this nuisance is permanent or temporary other than to suggest that storm sewers are permanent. Instead, the City of Albia argued that all actions for nuisance against a municipality are for a permanent nuisance as a matter of law.

Finally, the Court should reverse the district court's granting of the motion for summary judgment on the issue of the statute of limitations on the grounds of equitable estoppel. A party cannot benefit from the protection of a statute of limitations when by his own fraud he has prevented the other party from seeking redress within the statute of limitations. *Hook v. Lippolt*, 755 N.W.2d 514, 525 (Iowa 2008).

Here, the Plaintiff's testimony demonstrates that she and Ed Glenn notified the City of Albia of their water problems in a timely fashion. (App. 85, pg. 15). Each time they notified the City of their problem the City Council assured them that they would look into the problem and take action. (App. 81-82, pgs. 33-34). The record demonstrates that the first time the Defendant even attempted to make good on this promise was in June 2014. (App. 99-100). A reasonable jury could conclude that the City Council's mere platitudes were designed to forestall action on the part of the Plaintiff until after the statute of limitations ran.

CONCLUSION

Plaintiffs respectfully request that this Court reverse the ruling of the District Court in granting the City of Albia's Motion for Summary Judgment and remand back to the District Court for further proceedings.

REQUEST FOR ORAL ARGUMENT

Counsel for the Plaintiff requests to be heard in oral argument.

Respectfully Submitted,

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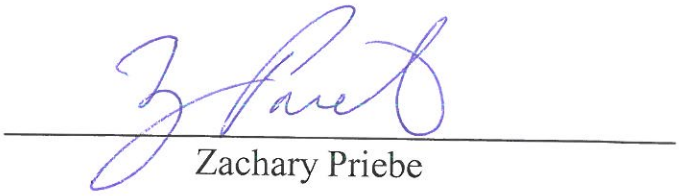
CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Iowa R. App. 6.903(1)(g)(1) because this brief contains 3252 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and they type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Times New Roman 14.



Zachary Priebe

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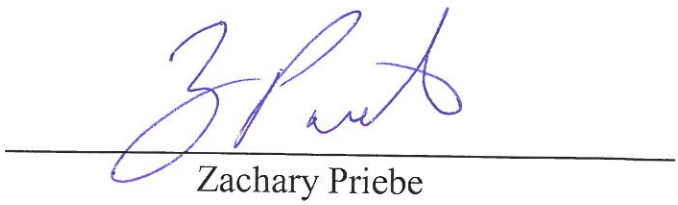
I, Zachary Priebe, hereby certify that I, or a person acting on my direction, did file the attached Appellant's Proof Brief and Request for Oral Argument via the Electronic Document Management System with the Clerk of the Iowa Supreme Court on this 13th day of May, 2016.



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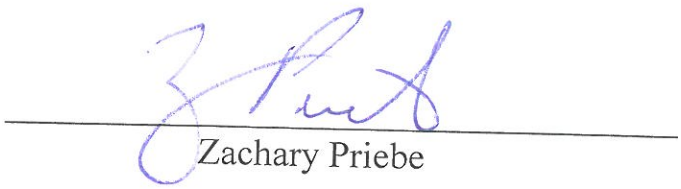
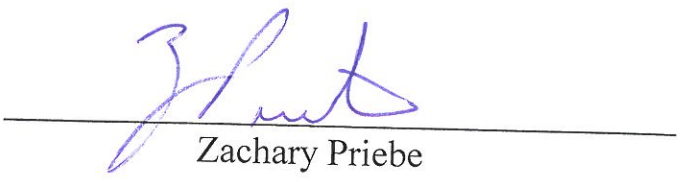


Zachary Priebe

CERTIFICATE OF FILING

I, Zachary Priebe, hereby certify that I, or a person acting on my direction, did file the attached Appellant's Proof Brief and Request for Oral Argument via the Electronic Document Management System with the Clerk of the Iowa Supreme Court on this 16th day of May, 2016.



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